Supreme Court, U.S.
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No.

In The
SUPREME COURT OF THE UNITED STATES

LOUISIANA ACORN FAIR HOUSING, INC.,
GENE LEWIS, *Petitioners,*

v.

DANNY LEBLANC, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Spencer Livingston
Counsel of Record
1024 Elysian Fields Ave.
New Orleans, Louisiana 70117
(504) 948-9560

Steve Bachman
51420 Hunters Crossing Court
Granger, IN 46530
(219) 674-0718

Alexandra E. Mora
614 Tchoupitoulas Street
New Orleans, Louisiana 70130
(504) 566-0233

Attorneys for Petitioners

62pp

QUESTIONS PRESENTED FOR REVIEW

Under the Fair Housing Act, 42 U.S.C. § 3601, *et seq.*, a fair housing organization has standing to sue if it meets the requirements of Article III. The Fair Housing Act also authorizes the award of compensatory damages and punitive damages. Additionally, it permits a plaintiff that is a "prevailing party" to recover attorneys' fees. The questions presented under this statute are:

1. Whether the Court of Appeals erred in vacating a $10,000 punitive damage award for an egregious violation of the Fair Housing Act merely because the jury did not award compensatory or nominal damages to the plaintiff.

2. Whether nominal damages are presumed from a violation of the Fair Housing Act.

3. Whether a fair housing organization that has investigated a complaint of housing discrimination using traditional investigative methods such as "testing," to the detriment of its other activities, has standing under the Fair Housing Act.

CORPORATE DISCLOSURE STATEMENT

At the time suit was filed, Louisiana ACORN Fair Housing, Inc. was a nonprofit corporation. It was not publicly held and had no parent company or subsidiaries. It is currently a project of ACORN Community Land Association of Louisiana, Inc., which has no parent company, or subsidiaries and is not publicly held.

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The petitioners, Louisiana ACORN Fair Housing Organization and Gene Lewis, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled proceeding May 15, 2000, and of which rehearing was denied on June 22, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 211 F.3d 298 (5th Cir. 2000), and is reprinted in the appendix hereto, as 5a-21a, *infra*.

The jury verdict, judgments, and memorandum rulings from the United States District Court for the Western District of Louisiana (Trimble, D.J.) have not been reported. The verdict form is reprinted in the appendix hereto as 28a-30a, *infra*, and the district court judgment is reprinted in the appendix hereto as 26a-27a, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2000, 22a-23a, *infra*, and a timely petition for rehearing was denied on June 22, 2000, which is reprinted hereto as 24a-25a, *infra*. This petition has been timely filed under 28 U.S.C. § 2101(c) and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves Article III, section 2 of the United States Constitution, which provides:

"The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the

Laws of the United States, and treaties made, or which shall be made, under their Authority . . . ."

This case also involves the federal Fair Housing Act, 42 U.S.C. § 3601, *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1982, which are reproduced, in relevant part, in the appendix hereto as 1a-4a, *infra*.

STATEMENT OF THE CASE

This suit arises from an incident in which Gene Lewis, who is black, tried to rent an apartment in Lake Charles, Louisiana from Danny LeBlanc, who is white. Mr. Lewis was refused the apartment because, as Mr. LeBlanc stated, Mr. Lewis was "black, color[ed], Negro, whatever you call yourself, I don't rent to y'all." App., *infra*, 6a.

Mr. Lewis sought help from Louisiana ACORN Fair Housing Organization ("LAFHO"). *Id.* LAFHO investigated Lewis' claim, and in so doing, diverting the organization's most precious resources: time and money. *See generally*, Trial Transcript, pp. 50-80.) After having determined that LeBlanc's discriminatory actions had violated Lewis' constitutional right to fair housing and frustrated LAFHO's stated mission, LAFHO counseled Lewis on his fair housing claim. *Id.*

LAFHO and Gene Lewis filed suit for injunctive relief and damages, alleging violations of the federal Fair Housing Act, Title VIII of the Civil Rights Act, codified at 42 U.S.C. § 3601 *et seq.*, and of the Louisiana Open Housing Act, La. Rev. Stat. Ann. 51:2601 *et seq.* App., *infra*, 6a. Gene Lewis further alleged violations under 42 U.S.C. §§ 1981 and 1982, and the Thirteenth Amendment to the United States Constitution. Record, 213-226. In addition, the U.S. Attorneys' office for the Middle District of Louisiana sought injunctive relief

against Mr. LeBlanc based upon information which LAFHO had obtained in the course of its investigation. (Civil Action No. 98-0080.) Record, pp. 288-211. These cases were later consolidated, but were later severed for trial purposes. Record, pp. 195-96.

At trial, extensive testimony was introduced regarding LAFHO's work on this case. Although LAFHO is headquartered in New Orleans, it operates an office in Lake Charles in order to further the organization's purpose of eradicating housing discrimination across the State. Tr., pp. 13, 14, 77. Lewis initially contacted the Lake Charles office about his claim. Tr., p. 13-14. That office put Lewis in touch with the main office, which conducted "testing." App., *infra*, 6a. Testing is an established investigative method used by fair housing organizations in which the organization selects and prepares a "tester" to apply for the same housing as did the complainant to ascertain whether discriminatory practices exist. Tr., pp. 51-60.

In this case, LAFHO selected, trained and monitored a white tester to call Mr. LeBlanc and view the apartment. The tester filled out a testing report, a copy of which was provided as an exhibit at trial. Tr., pp. 55-57. Although LAFHO's investigator did not keep time sheets for his work related solely to the Lewis complaint, he did testify credibly at trial in support of LAFHO's claims regarding the resources it expended in its investigation of Mr. Lewis' fair housing claim. Tr., pp. 50-80.

On September 15, 1998, the jury returned a verdict for Lewis and LAFHO. App., *infra*, 28a-30a. By special verdict form, the jury determined that Mr. LeBlanc had indicated a preference not to rent apartments to black people and had refused to rent to Mr. Lewis because of his color and race. *Id.* By this same verdict form, the jury was given the option of awarding nominal, compensatory and/or punitive damages. *Id.* The

members of the jury were not instructed that they must predicate an award of punitive damages upon nominal or compensatory damages. App., *infra*, 7a.

At one point, the jury requested an explanation of nominal damages. *Id.* at 7a-8a. The court read them a definition, which described nominal as a "trifling sum" that recognizes a "technical invasion" of a plaintiff's rights. App., *infra*, 8a. Ultimately, the jury awarded LAFHO $1,076 in compensatory damages, and awarded Mr. Lewis $10,000 in punitive damages. App., *infra*, 7a. Presumably the jury did not award nominal damages because those were defined as "trifling," and, logically, would be unnecessary in a case where substantial punitive damages were already awarded.

Plaintiffs subsequently filed a motion for attorneys' fees along with detailed time sheets and affidavit, which the judge reduced by about half. Record, pp. 244-288. App., *infra*, 7a.

Plaintiffs intended to move for injunctive relief as well, Record, p. 211, but did not because they were informed that the U.S. Attorney's Office would do so and had the capacity to secure more extensive relief, *see* Record, pp.64-65. Based on the jury's verdict, the U.S. Attorney's office moved for injunctive relief in its own consolidated action, most of which it won. *Id.*

An appeal was filed by the respondent on the issue of punitive damages and attorneys' fees. Petitioners filed a cross-appeal, arguing that the trial judge improperly reduced their attorneys' fees.

The Fifth Circuit reversed and vacated the awards of punitive damages, compensatory damages, and attorneys' fees. It vacated the jury's award of punitive damages to Gene Lewis on the grounds that punitive damages are unavailable absent an award of compensatory or nominal damages under the Fair Housing Act. In doing so, the Fifth Circuit ignored the

fact that Lewis' claims were also brought under §§ 1981, 1982, and the Thirteenth Amendment.

The Fifth Circuit also raised the issue of LAFHO's standing, *sua sponte*, and held that LAFHO had failed to establish its standing at trial. On that basis, the court of appeals vacated the award of compensatory damages.

Finally, it determined that the petitioners had not prevailed (ignoring the injunctive relief to which it had been instrumental in obtaining) and vacated the award of attorneys' fees.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Opinion Is In Direct Conflict with the Third Circuit's Opinion in *Riga v. Alexander*, a case in which the defendants have filed a petition for writ of certiorari.

The defendants in *Riga v. Alexander* have recently filed a petition for a writ of certiorari to the Third Circuit with this Court. That petition raises the same issues as those raised herein–punitive damages and standing under the Fair Housing Act–except that the Third Circuit's decision is consistent with Supreme Court precedent.

In the case at hand, Gene Lewis and LAFHO request that writ be granted partly on the basis of the split that now exists between the Third and Fifth Circuits. Alternatively, petitioners request that the Court's decision regarding their petition be held in abeyance pending its ruling on the petition for writ of certiorari to the Third Circuit, or that the two cases be simultaneously considered.

II. The Fifth Circuit's Holding That Punitive Damages May Not Be Awarded In the Absence of An Award of Compensatory or Nominal Damages Should Be Reviewed And Reversed by this Court.

The Fifth Circuit's decision should be reviewed and reversed for the following reasons. First, the court of appeals' decision undermines the purpose of punitive damages and is inconsistent with this Court's guidance on that issue. Second, the appellate court's decision also conflicts with those of other circuit courts in fair housing and other civil rights cases. Finally, the Fifth Circuit's error in its reasoning on this issue is compounded by its procedural error. Even if the Fifth Circuit is correct in its ruling on punitive damages, its decision to simply vacate the jury's award rather than to remand is a gross departure from judicial proceedings and merits review. *See* Supreme Court Rule 10(a).

A. The Fifth Circuit Opinion Undermines The Purpose of Punitive Damages Under the Fair Housing Act and Conflicts with Supreme Court Precedent.

The Fifth Circuit's reasoning is inconsistent with the Supreme Court's observation in *City of Newport v. Facts Concerts Inc.* that punitive damages serve a different purpose from compensatory damages since, by definition, punitive damages are meant to punish and deter, rather than compensate. 453 U.S. 247, 266 (1981). The decision below also disregards the Supreme Court's holding in *Smith v. Wade* that courts should look to common law principles and to the purposes of the statute in determining whether punitive damages are available. 461 U.S. 30, 34 (1983)("in the absence of more specific guidance, we look first to the common law of torts * * * with such modifications or adaptation as

might be necessary to carry out the purpose and policy of the statute"). The common law rule is that punitive damages are available in the absence of compensatory damages. *See* Restatement (Second) Torts § 908 comment b ("Although a defendant has inflicted no harm, punitive damages may be awarded because of, and measured by, his wrongful purpose or intent . . . "); Linda A Schleuter & Kenneth R. Redden, Punitive Damages 6.1(D)(4)(a) nn. 1, 4 (3rd Ed. 1995); *id.* at 6.2(D)(4)(a) ("Punitive damages would seem especially appropriate in situations where actual damages are unascertainable or difficult to calculate but where the wrongful mental state of the defendant is clear"); W. Page Keeton *et al.*, Prosser & Keeton on Torts 14-15 (5th Ed. 1984).

This rule best serves the Fair Housing Act's purpose of deterring housing discrimination. *See* 42 U.S.C. § 3601. The deterrence effect of punitive damages is critical to the enforcement of the Fair Housing Act. Since most fair housing cases do not involve significant monetary losses, the availability of punitive damages and attorneys' fees provides an incentive for private individuals to sue and enables them to secure competent civil rights attorneys to represent them. Robert G. Schwemm, Housing Discrimination: Law & Litigation, § 25.3 (2)(b) at 25-19 (1990 & Supp. 1997). Congress recognized the importance of deterrence when it amended the Act in 1988 to remove the $1,000 cap on punitive damages. H.R. Rep. No. 711, 100th Cong., 2d Sess. 40 (1988). The House Report specifically stated that "[t]he committee believes that the limit on punitive damages served as a major impediment to imposing an effective deterrent on violators and a disincentive for private persons to bring suit under the existing law." *Id.* *See also Carlson v. Green*, 446 U.S. 14, 22 n. 9 (1980) ("punitive damages may be the only significant remedy available in some section 1983 actions where

constitutional rights are maliciously violated but the victim cannot prove compensable injury").

As Judge King noted in her dissent to the decision below, without punitive damages, the defendant "emerges from the case with no financial disincentive to continue his practices. . . .," nor are other "landlords in the community hereby discouraged . . . ." App., *infra*, 21a. Judge King also warned of the detrimental effect of the Fifth Circuit's decision on other civil rights cases: "I also see it as providing a basis for similar conclusions in other contexts, thereby threatening the fulfillment of other civil rights acts' goals." *Id.*

B. The Fifth Circuit's Opinion Regarding Punitive Damages Conflicts with the Third, Seventh, and Ninth Circuits.

Although the specific issue of whether punitive damages may be awarded under the Fair Housing Act absent an award of compensatory or nominal damages has not been directly addressed by many circuit courts, the ones that have are split. This split echoes the rift among the circuits on this same issue in cases arising under similar civil rights laws, such as §§ 1981, 1983, Title VII, and the Americans with Disabilities Act. For example, in a case that is quite similar to the instant proceeding – except that it arose under Title VII, rather than the Fair Housing Act– Judge Easterbrook of the Seventh Circuit arrived at the opposite conclusion to that of the Fifth Circuit below. Compare App., *infra*, 5a-21a, with *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1990). The issue before the Court today is particularly appropriate for review because its many aspects have been fully explored by the circuits in various civil rights' contexts.

The circuits are now clearly in conflict regarding the federal common law on punitive damages as they apply under the Fair Housing Act. The Third Circuit recognizes the availability of punitive damages absent compensatory or nominal damages, while the Fifth and Fourth Circuits deny such relief. Compare *Alexander v. Riga*, 208 F.3d 319 (3rd Cir. 2000)[1] with the opinion below, *App., infra*, 5a-21a, with *People Helpers Fund Inc. v. Richmond* 12 F.3d 1321 (4th Cir. 1993).

This split is all the more provocative because of the discord in reasoning that exists even among those courts which concur as to the result. The Fifth Circuit specifically noted in its opinion below that while it agreed with the Fourth Circuit's conclusion, it found the Fourth Circuit's analysis flawed because the Fourth Circuit couched the question in terms of state, rather than federal, law. *App., infra* 11a. (criticizing the analysis of the Fourth Circuit in *People Helper* because it relied too heavily on state law).

Other courts have endorsed the Third Circuit's views. To the degree that the Seventh and Ninth Circuits have addressed this specific issue under the Fair Housing Act, they have indicated that punitive damages are available in this instance. The Seventh Circuit has generally recognized that an award of punitive damages need not be conditioned upon a finding of actual damages in fair housing cases. *Rogers v. Loether*, 467 F.2d 1110, 1112 n.4 (7th Cir. 1972), *aff'd sub nom on other grounds, Curtis v. Loether*, 415 U.S. 189 (1974)(citing *Wardman-Justice Motors, inc. v. Petrie*, 39

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[1] *See also Fowler v. Borough of Westville*, 97 F.Supp.2d 602, 612 n.6 (D.N.J.,2000)(generally citing with approval *Alexander v. Riga, supra*); *Badami v. Flood*, 214 F.3d 994 (8th Cir. 2000)(citing language regarding punitive damages from *Alexander v. Riga, infra*, with approval).

F.2d 512, 516 (D.C. 1930) and *Batista v. Weir*, 340 F.2d 74 (3rd Cir. 1965)). The Ninth Circuit has affirmed an award of punitive damages where only nominal damages were awarded. *Fountila v. Carter*, 571 F.2d 487 (9th Cir. 1978).[2]

Historically, the views of the Third and Seventh Circuits have remained uniform, irrespective of the specific civil rights law at issue. In *Batista v. Weir*, the Third Circuit broadly pronounced that the federal common law permits recovery of punitive damages, and that "as a matter of federal common law it is not necessary to allege nominal damages and nominal damages are proved by proof of deprivation of a right to which the plaintiff was entitled." 340 F.2d 74, 87 (3rd Cir. 1965). The *Batista* Court noted the historic importance of the Civil Rights Acts and stressed that they must be applied uniformly, "otherwise the Civil Rights Acts would fail to effect the purposes and ends which Congress intended." 340 F.2d at 87.

Similarly, the Seventh Circuit has consistently upheld punitive damages in the absence of compensatory damages, whether under § 1983 for a purely constitutional violation, *Erwin v. Manitowoc*, 872 F.2d 1292 (7th Cir. 1989),[3] or for violation of federally protected rights under Title VII and § 1981(a), *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir.

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Passantino v. Johnson & Johnson Consumer Products, Inc., 212 F.3d 493, 514 (9th Cir. 2000)(in dicta noting that punitive damages may be awarded in the absence of compensatory or nominal damages, as long as the plaintiff has shown that the defendant violated a federally protected right).

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Accord Endicott v. Huddleston, 644 F.2d 1208 (7th Cir. 1980); *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974); *Buckner v. Franco, Inc.*, 1999 W.L. 232704 (6th Cir. Apr. 12, 1999).

1998);[4] *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344 (7th Cir. 1995). The reasoning of the Seventh Circuit when confronted with this specific issue in the context of Title VII, should apply with equal force in cases which involve other federally protected rights, such as fair housing.

In *Timm v. Progressive Steel Treating, Inc.*, Judge Easterbrook of the Seventh Circuit noted that when this issue had previously arisen in the context of constitutional violations under § 1983, the court had refused to predicate an award of punitive damages upon a finding of compensatory damages because "[e]xtra-statutory requirements for recovery should not be invented." 137 F.3d 1008, 1010 (7th Cir. 1998). In declining to read a compensatory-punitive link into Title VII, the *Timm* court noted that there would be no logical reason for reading "a compensatory-punitive link into § 1981a or Title VII, but not § 1983." *Id.* Judge King cited *Timm* with approval in her dissent to the decision below. App., 21a, *infra.*

Some courts have addressed the punitive damages issue only in cases where purely constitutional violations are involved. Those courts concur that punitive damages may stand alone where the right violated is constitutional (as opposed to statutory) . For example, in §1983 cases involving constitutional violations, the Second Circuit concluded that punitive damages may be awarded in the absence of compensatory damages. *Robinson v. Cattaraugus County*, 147 F.3d 153 (2nd Cir. 1998).[5] The Tenth Circuit

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[4] *See also E.E.O.C. v. W & O, Inc.*, 36 F.Supp.2d 1348 (S.D.Fla.,1998)(citing *Timm* with approval).

[5] *Accord Stolberg v. Members of Bd of Trustees for State Colleges of State of* Conn., 474 F.2d 485 (2nd Cir. 1973); *Beckford v. Irvin*, 49

came to the same conclusion when confronted with that issue. *Silver v. Cormier*, 529 F.2d 161 (10th Cir. 1976).

Even the Fifth Circuit agrees that it will support the award of punitive damages absent proof of actual injury, so long as a constitutional right has been violated. *App., infra*, 12a (citing *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983); *Wilson v. Taylor*, 658 F.2d 1021 (5th Cir. 1981); *McCullough v. Glasgow*, 620 F.2d 47 (5th Cir. 1980)).[6] *See also Campos-Orrego v. Rivera*, 175 F.3d 89 (1st Cir. 1999)(noting that constitutional violations do not require compensatory damages or nominal ones to support a punitive damage award).

The decision by the Fifth Circuit in this case is all the more astounding because it conflicts with its own precedent (which it failed to even acknowledge) that punitive damages may be awarded in the absence of compensatory damages for housing discrimination claims brought under Section 1981. *See Hodge v. Seiler*, 558 F.2d 284, 287 (5th Cir. 1977) (court erred in refusing to award nominal damages to victim of racial discrimination in housing, even though she admitted

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F.Supp. 170 (W.D. NY 1999); *Voorhees v. Shull*, 686 F.Supp. 389 (E.D.NY 1987). *See also King v. Macri*, 993 F.2d 294 (2nd Cir. 1993)(in § 1983 action, punitive damage award where not compensatory or nominal damages were awarded would not be disturbed where jury was told that punitive damage award could be made absent compensatory damages, and where jury was not instructed that award of nominal damages could be made). *But see Jones v. Wittenberg*, 330 F.Supp. 707 (N.D. Ohio 1971)(absent proof of actual damages, punitive damages were not recoverable in action against county officials regarding jail conditions).

[6] *See also Peden v. Suwannee County School Bd.*, 837 F.Supp. 1188 (M.D. Fla. 1993)(in action brought under §1983, court vacated a jury's award of punitive damages in absence of any finding of plaintiff's constitutional rights being violated because it was mere surplusage).

that she had suffered no actual damages, and directing court to consider what punitive damages should be awarded). Here, Gene Lewis not only brought suit under the Fair Housing Act, but also under §§ 1981 and 1982, and for violation of the Thirteenth Amendment to the U.S. Constitution. These statutory and constitutional claims were included in the jury instructions and formed a basis for the award. Thus, even under the Fifth Circuit's own stated reasoning, the punitive damage award should have been upheld. Yet this key fact was inexplicably glossed over by the Fifth Circuit. While we recognize that an intra-circuit conflict, standing alone, is not sufficient to warrant this Court's review, the Fifth Circuit's failure to even consider its own jurisprudence in its rush to a judgment that conflicts with the approach of this Court and other circuits underscores the compelling need for this Court's review

The Fifth Circuit acknowledged, as it was compelled to do, that for constitutional violations the rule is clear that compensatory damages are not a prerequisite to an award of punitive damages. Indeed this Court has made that point clear. See *Carlson v. Green*, 446 U.S. 14, 22 n. 9 (1980) ("punitive damages may be the only significant remedy available in some section 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury") The Fifth Circuit's attempt to carve out a different rule for statutorily-based discrimination claims, however, is in conflict with the approach of the Seventh Circuit, *See Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir. 1998)(Easterbrook, J.)("no reason comes to mind for reading a compensatory-punitive link into Section1981 or Title VII but not Section 1983"), and is illogical. In a case like the one below, where a claim could be made for a constitutional violation or for a fair housing violation, or both, it is illogical that under one scenario the plaintiff could keep

his or her punitive damages and under another be denied them. It is absurd that plaintiffs bringing suit under the Fair Housing Act would be entitled to less relief than those who file suit under §§ 1981 and 1982, since the Fair Housing Act was meant to enhance enforcement of § 1982. *See Jones v. Alfred H. Mayer Co.*, 88 S.Ct. 2186, 2191 & n.19 (U.S. 1968)(citing 114 Cong. Rec. H 2807, 2808 (April 10, 1968) the Fair Housing Act has a "complicated statutory scheme, including administrative, judicial, and other sanctions for its effectuation * * * It's potential for effectiveness is probably much greater than [1982] because of the sanctions and the remedies that it provides.").

C. The Fifth Circuit's Decision To Disregard the Jury's Verdict Regarding Punitive Damages Rather Than to Remand The Case For Reconsideration Constitutes Procedural Error that Compounds its Error in Reasoning.

Besides the above-described grounds for granting a writ of certiorari, the divergence between the Seventh and Fifth Circuits regarding certain procedural aspects of an award of punitive damages provides additional compelling reasons for this Court's review.

In *Timm v. Progressive Steel Treating, Inc.*, *supra*, the Seventh Circuit was confronted with an analogous civil rights case. 137 F.3d 1008 (7th Cir. 1998). Indeed, the facts presented in *Timm*, a case arising under Title VII, are startlingly similar to those of the case below in their relevant characteristics. Although *Timm* involved sexual harassment, the acts complained of were also of limited duration, were particularly outrageous, and, when presented to the jury, ultimately resulted in what might be viewed as inconsistent verdict responses. *Id.* The

jury awarded $15,000 in punitive damages, which is not dissimilar to the award below, and which the Seventh Circuit noted was not excessive in view of the "harm that unchecked sexual harassment can inflict." *Id.* at 1010. And, as in the case below, the jury did not award any compensatory or nominal damages.

The *Timm* court concluded that punitive damages were not inconsistent with the lack of compensatory damages. *Id.* at 1010-11. And, as the Seventh Circuit noted, even if the verdicts were "inconsistent," there was no grounds for conforming the verdicts to the lack of compensatory damages, since one could just as easily argue the contrary: **that the verdicts should be conformed to the award of punitive damages**. *Id.* at 1010. In surmising why the jury might have come to its unorthodox conclusion, the court noted that the jurors might have simply "preferred to award a single sum under the punitive category rather than apportion between compensatory and punitive damages." *Id.* at 1011. But, the court noted, no matter its thinking, the jury's award had no legal flaws. *Id.*

This same rationale for the jury's decision could be equally applied in the case below. Instead, the Fifth Circuit refused to acknowledge a legitimate basis for the jury's decision and reached a contrary conclusion to that of Judge Easterbrook in *Timm*.

Although the Fifth Circuit's opinion is not articulated as such, it essentially decided not only that the verdicts were inconsistent, but that the proper remedy, so to speak, was to "conform" the verdicts to the lack of compensatory or nominal damages. The Fifth Circuit should have remanded the case. This procedural error compounds its error in reasoning.

III. The Fifth Circuit's Decision On Nominal Damages Conflicts With Relevant Decisions of this Court and With the Second Circuit.

The discussion about punitive damages and whether or not they may stand alone begs a related question. If this Court were to disagree with LAFHO's position and require an award of punitive damages to be predicated upon an award of at least nominal damages in a fair housing case, then the issue of whether nominal damages must be presumed from a finding that a fair housing violation occurred becomes crucial to petitioner's posture in this case.

The Fifth Circuit's refusal to presume nominal damages based upon the jury's finding of a fair housing violation disregards Supreme Court guidance on this issue. For example, this Court has indicated that nominal damages must be presumed for the violation of constitutional rights. *E.g., Carey v. Piphus*, 435 U.S. 247, 267 (1978)(plaintiffs whose rights to procedural due process were abridged would be "entitled" to nominal damages if they failed to prove compensable harm); *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986)(under § 1983, violation of a constitutional right may give rise to nominal damages). *See also Gibeau v. Nellis*, 18 F.3d 107, 110-111 (2nd Cir. 1994) (under § 1983, "an award of nominal damages is not discretionary where a substantive constitutional rights has been violated"). Even the Fifth Circuit has admitted that where a constitutional right is involved, nominal damages may be presumed, *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977), but refuses to recognize this same principle in housing discrimination cases. App., *infra.*, 15a.

The Fifth Circuit's decision on this issue conflicts with the Second Circuit. In fair housing cases, the Second Circuit has concluded that nominal damages are

mandatory where a violation of the Act is proven. *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 431 (2nd Cir. 1995) (holding in a fair housing case that nominal damages are mandatory if the plaintiff proves a civil rights violation but does not prove compensable injury, that it was plain error for the court to instruct the jury only that it "may" award such damages if it found a violation occurred, and that district was required to award nominal damages on remand); *Cabrera v. Jakabovitz*, 24 F.3d 372, 391 (2nd Cir.) (district court correctly awarded nominal damages in fair housing case even though jury declined to award such damages), *cert. denied*, 513 U.S. 876 (1994); *McKenna v. Peekskill Housing Authority*, 648 F.2d 332, 335-336 (2nd Cir. 1981) (Fair Housing Act). Thus, the issue of whether nominal damages must be presumed from a violation of the Fair Housing Act merits review as well.

IV. The Fifth Circuit's Decision On Standing Conflicts With the Supreme Court's Decision in *Havens* and With Decisions of Other Circuits.

The Fifth Circuit's decision regarding standing in this case deserves the review of this Court for a number of reasons. It muddies standing requirements under the Fair Housing Act, conflicts with and misapprehends prior decisions of this Court, and weakens the enforcement of the Fair Housing Act. Moreover, the Fifth Circuit's decision with respect to standing has "so far departed from the accepted and usual course of judicial proceedings," that it merits review of this Court. Rule 10(a) of the Supreme Court Rules. Also, this Court's supervisory authority is enhanced where, as here, federal procedural and jurisdictional questions are implicated. *E.g. McNabb v. U.S.* 318 U.S. 322, 341 (1943); *Bruner v. U.S.*, 343 U.S. 112 (1952).

The Fifth Circuit's opinion regarding standing first addresses the general requirements of injury in fact. App., *infra*, 16a-17a. It then briefly discusses its rule that resources spent on litigation costs and counseling cannot confer standing. App., *infra*, 18a. The Fifth Circuit then quotes a paragraph of testimony by LAFHO's representative regarding the concept of "frustration of mission," characterizing that testimony as too speculative and hypothetical to confer standing. App., *infra*, 19a. In doing so, the Fifth Circuit inexplicably overlooks the jury's decision that LAFHO suffered damages in the precise amount of $1,076; and ignored LAFHO's detailed testimony regarding testing and how it affects its other activities.

This raises certain problems. First, the Fifth Circuit did not give proper deference to factual findings by the jury and inferences arising from those facts. Second, the court seems to be equating "testing" with "litigation" costs: since testing was conducted, but the court discusses litigation costs, presumably the court equates the two. App., *infra*, 18a (court states that redirecting resources to "litigation" and "legal counseling" is not enough for standing.) Since litigation costs cannot confer standing, and since the Fifth Circuit suggests that testing is a litigation cost, then, under the Fifth Circuit's analysis, expenditures based on testing could never confer standing. How then could any fair housing organization ever establish standing under the Act?

According to this Court in *Havens Realty Corp. v. Coleman*, "Congress intended standing under the Fair Housing Act to extend to the full limits of Article III." 455 U.S. 363, 372 (1981). The "only requirement for standing to sue under § 812 [of the federal Fair Housing Act] is the Art. III requirement of injury in fact." *Id.* at 376. *See also Watts v. Boyd Properties, Inc.*, 758 F.2d 1482, 1485 (11th Cir. 1985); *City of Chicago v. Matchmaker Real Estate Sales Ctr. Inc.*, 982 F.2d 1086

(7th Cir. 1992), *cert. den.*, 113 S. Ct. 22961 (1993). Moreover, the injury need not measure more than an "identifiable trifle." *U.S. v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669, 689 n. 14 (1973). Indeed, the actual or threatened injury required by Article III may exist "solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Havens* 455 U.S. at 372; *See also id.* ("Congress has thus conferred on all "persons" a legal right to truthful information about available housing."); *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972).

The Supreme Court's decision in *Havens Realty v. Coleman* describes how "testing" fits into the concept of standing under the Fair Housing Act. Although standing was raised in *Havens* in a motion to dismiss, and not, as here, following a trial on the merits, *Havens* provides clear guidance on this point. In *Havens*, a black man's complaint came to the attention of HOME, a fair housing organization. HOME conducted "testing" to investigate and identify the discrimination. In its complaint, HOME alleged sufficient injury in fact. It alleged that it had:

> "been frustrated by defendant's racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices." at 379, 1124.

Based on this allegation, the *Havens* Court ultimately concluded that HOME had standing because if the discriminatory "practices have perceptively impaired HOME's ability to provide counseling and referral services for low-and moderate-income home seekers, there can be no question that the organization

has suffered injury in fact." *Havens* 455 U.S. at 379. That the Supreme Court concluded that HOME had standing where the allegations showed that HOME had conducted testing and investigation, to the detriment of its other activities, indicates that the Supreme Court equates "testing" and "investigation" with "identify[ing] and counteract[ing]" the discrimination. *See also Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1525-1526 (7th Cir. 1990)(expenditures for testing and investigation are part of an injury in fact); *Alexander v. Riga*, 208 F.3d at 419 (3rd Cir. 2000)(where testing was conducted to the detriment of organization's other projects, standing was established). Thus, testing is not a "litigation" cost, but an expense that, if conducted to the detriment of other activities, may confer standing.

At trial, LAFHO proved that it conducted testing and investigative work, to the detriment of its other activities. Jeff Karlson, a representative of LAFHO, testified at length about his investigation of Lewis' complaint. First, Karlson detailed the nature of "testing" work (Tr. pp. 51-52.) Then he specifically discussed the testing and investigation that he conducted regarding Gene Lewis' complaint. (Tr. pp. 54-60.) He stated that he selected and prepared a white tester, Neal Carlson, (no relationship), to call Mr. LeBlanc, inquire about an apartment, and if one was available, arrange to view it. (Tr. pp. 54-56.) The tester called Mr. LeBlanc, was informed that an apartment was indeed available, and arranged to view it. *Id.* After viewing the unit, the tester completed a report. (Tr. pp. 55-57.)

Shortly thereafter, Jeff Karlson had Mr. Lewis himself call to inquire about an apartment. (Tr. pp. 57-58.) Mr. Karlson testified that he set up a conference call and tape-recorded that conversation. (Tr. pp. 57-58.) During that conversation, Mr. Le Blanc told Mr. Lewis that no apartments were available. (Tr. p. 58.) Mr. Karlson then had the white tester call again to confirm that the

apartment remained available. He did so, and it was. (Tr. pp. 58-59.) Besides his discussion of time spent on testing, Mr. Karlson also described other costs involved including testing reports, copies of tapes, (Tr. pp.62-64), overhead, travel, and long distance bills (Tr. p.65), and future testing (Tr. p.67). Finally, he discussed how his testing absorbed his time, to the detriment of LAFHO's other work, such as housing fairs. (Tr. 77-80).

The Fifth Circuit, however, entirely disregarded this evidence and disregarded the jury's finding (and all inferences arising therefrom) that the organization was damaged in the amount of $1,076. This suggests that the court of appeals believed that something more than testing (at the expense of other activities) was needed to establish standing.

The Fifth Circuit makes only the slightest reference to LAFHO's testing, noting only that Jeff Karlson "conducted testing that confirmed Lewis' allegation that Leblanc discriminated against prospective tenants based on race." App., *infra*, 6a. The Fifth Circuit made no reference to testimony about the effect that testing had on LAFHO's other activities, and disregarded all inferences to that affect. Instead, the Fifth Circuit selected one paragraph in which LAFHO's representative generally discussed "frustration of mission." App., *infra*, 19a. While the court might have concluded that an award of "frustration of mission" damages was not supported by that testimony, there was no basis for concluding that standing was not established.

Additionally, this Court's review of standing in the decision below is warranted because that decision affects fair housing enforcement. Because fair housing organizations play a significant role in enforcing the Fair Housing Act, their standing to sue has a resounding effect on enforcement. *See e.g.*, Alex S. Navarro, Bona Fide Damages For Tester Plaintiffs: An Economic Approach to Private Enforcement of the Anti-

Discrimination Statutes, 81 Georg. L.J. 2727 (1993). Courts have noted the role that fair housing organizations play in ending discriminatory housing, likening them to "private attorneys-general," vindicating the rights of the public:

> "[t]o the extent that plaintiffs seek to vindicate values, those values were endorsed by Congress in the Fair Housing Act, the enforcement of which Congress specifically left in the hands of private attorneys like plaintiffs. Although the Attorney General and the Department of Housing and Urban Development may enforce the Act, their resources are markedly limited. Congress decided, therefore, to rely primarily on "private suits in which, the Solicitor General [has noted] the complainants act not only on their own behalf but also as `private attorneys general in vindicating a policy that Congress considered to be of the highest priority." *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990)(Ginsburg, J.)(quoting *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972)).

The procedural history of the case below highlights the importance of this theory and how it operates. LAFHO played a critical role in assisting Gene Lewis in exercising his rights under the fair housing laws. If it were not for LAFHO, it is unlikely that Mr. Lewis would have secured the relief he did, and which the jury felt he rightfully deserved. LAFHO conducted testing, obtained direct evidence of discrimination, consulted with experienced civil rights' attorneys, provided the evidence obtained to HUD, and secured the involvement of the U.S. Attorney's office (which then obtained injunctive relief based upon the jury verdict). Without LAFHO's expertise and involvement, Mr. Lewis would probably not have achieved the same results at trial.

It is that role which is undermined by decisions like this one for which the petitioners seek review. Because of the uncertainty attendant to bringing suit now that organizational standing is under attack by various courts, *e.g.*, *Fair Housing Council v. Montgomery Newspapers*, 141 F.3d 71, 80 (3d Cir. 1998)(equating monitoring with litigation), organizations like LAFHO are forced to spend limited resources litigating standing, rather than investigating discrimination. In the absence of guidance from this Court through the exercise of its review, fair housing will be buried by expensive appeals trying to determine the law of standing in their jurisdiction.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court grant the petitioners a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted.

Spencer Livingston
Counsel of Record
1024 Elysian Fields Ave.
New Orleans, Louisiana 70117

Steve Bachman
51420 Hunters Crossing Court
Granger, Indiana 46530

Alexandra E. Mora
614 Tchoupitoulas Street
New Orleans, Louisiana 70130

Attorneys for Petitioners

APPENDIX

The Civil Rights Acts of 1866, 42 U.S.C. § 1981 provides equal rights to all to make and enforce contracts.

The Civil Rights Acts of 1866, 42 U.S.C. § 1982, provides that:

"All citizens shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

The Fair Housing Act, 42 U.S.C. 3601, *et seq.*, reads in relevant part:

> "**§3601: Declaration of Policy:**
> It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.
>
> **§3602: Definitions:**
> As used in this subchapter--
> . . .
> (b) `Dwelling' means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.
> . . .

(d) `Person' includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, receivers, and fiduciaries.
(e) `To rent' includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.
(f) `Discriminatory housing practice' means an act that is unlawful under section 3604, 3605, 3606, or 3617 of this title.
. . .
(i) `Aggrieved person' includes any person who--
(1) claims to have been injured by a discriminatory housing practice; or
(2) believes that such person will be injured by a discriminatory housing practice that is about to occur.
. . .
(o) `Prevailing party' has the same meaning as such term has in section 1988 of this title.

. . .

§ 3604. Discrimination in the sale or rental of housing and other prohibited practices:
As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful--
(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or

national origin.
(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.
(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

. . .

§ 3613: Enforcement by Private Persons:
a) Civil action
(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

. . .

(c) Relief which may be granted
(1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d) of this section, may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in

such practice or ordering such affirmative action as may be appropriate).

(2) In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-31351

LOUISIANA ACORN FAIR HOUSING; Gene Lewis,
Plaintiffs-Appellees-Cross-
Appellants,
v.
Danny LeBLANC,
Defendant-Appellant-Cross-Appellee.

Appeals from the United States District Court for the
Western District of Louisiana

May 15, 2000.

Before KING, Chief Judge, and DUHE and DeMOSS, Circuit Judges.

DUHE, Circuit Judge:

Danny LeBlanc appeals a jury's award of punitive damages to Gene Lewis, compensatory damages to Louisiana ACORN Fair Housing, Inc. (the "Appellees"), and the district court's award of attorney's fees to Appellees. The Appellees also appeal the district court's attorney's fees award. We reverse and vacate the jury's punitive damage award to Lewis, its compensatory damage award to ACORN, and the district court's attorney's fees award. We affirm all other issues.

I. BACKGROUND

Gene Lewis ("Lewis"), who is black, called Danny LeBlanc ("LeBlanc") on January 2, 1996, in response to a newspaper advertisement regarding the rental of a one-bedroom apartment in Lake Charles, La. LeBlanc owns and rents eleven furnished apartment units. Lewis then went to view the apartment and make the $100 deposit LeBlanc had requested. A tenant, Betty Richardson, showed Lewis the apartment. Richardson told Lewis that she did not think LeBlanc would rent to him because LeBlanc was prejudiced.

Lewis then asked to speak to LeBlanc. When LeBlanc arrived, he allegedly told Lewis that "I just don't rent to you people." When Lewis asked what LeBlanc meant by "you people," LeBlanc stated "black, color[ed], Negro, whatever you call yourself, I don't rent to y'all." LeBlanc contends that he did not rent to Lewis because Lewis was arguing with Richardson and, therefore, he did not like Lewis' attitude. Lewis later consulted Louisiana ACORN Fair Housing, Inc. ("ACORN"), a private nonprofit fair housing organization, which conducted testing that confirmed Lewis' allegation that LeBlanc discriminated against prospective tenants based on race.

Lewis and ACORN sued LeBlanc under the Federal Fair Housing Act, 42 U.S.C. § 3601 et seq. ("FHA"), and under the Louisiana Open Housing Act, La.Rev.Stat. Ann. § 51:2601 et seq. (West 1999). This suit was later consolidated with a suit brought by the United States against LeBlanc also under the Federal Fair Housing Act. The two cases were later severed for trial purposes because the United States was seeking injunctive relief, which it subsequently won, and Lewis and ACORN were seeking monetary relief.

A jury trial was held and the jury verdict is the centerpiece of this appeal. The jury first concluded

that LeBlanc made statements to Lewis indicating an intent not to rent apartments to black people. The jury then found that LeBlanc refused to rent an apartment to Gene Lewis and that race or color was an effective reason for that refusal.

The Jury awarded Lewis no compensatory or nominal damages but awarded him $10,000 in punitive damages. The jury based its punitive damages award on its finding that LeBlanc's refusal to rent an apartment to Lewis was motivated by ill will, malice, or a desire to injure Lewis, or a reckless or callous disregard for Lewis' legal rights. The jury awarded ACORN $1,076 in compensatory damages but did not award it nominal or punitive damages. The district court later awarded the Appellees $10,000 in attorney's fees pursuant to 42 U.S.C. § 3613(c)(2). [FN1]

> FN1. The FHA allows a prevailing party to recover reasonable attorney's fees and costs. The district court held that both Lewis and ACORN were prevailing parties under the Act because the jury found that LeBlanc had violated the FHA even though it did not award Lewis any actual damages.

Although the district court provided detailed instructions regarding damages to the jury, it did not specify whether a punitive damages award must be predicated upon a nominal or compensatory damages award. The court made clear that if the jury determined that LeBlanc violated the FHA it may award compensatory and/or nominal damages. During its deliberations, the jury asked the court for definitions of compensatory and nominal damages. The judge then read definitions to the jury from Black's Law Dictionary. The judge said

"[c]ompensatory damages are such as will compensate the injured party for the injury sustained and nothing more, such as will simply make good or replace the loss caused by the wrong or injury, damages awarded to a person as compensation, indemnity or restitution for harm sustained by him." Regarding nominal damages, the judge said, "[n]ominal damages are a trifling sum awarded to a plaintiff in an action where there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of his rights or a breach of the defendant's duty, or in cases where, although, there has been a real injury, the plaintiff's evidence entirely fails to show its amount."

II. DISCUSSION

A. Punitive Damages

LeBlanc contends that we should vacate Lewis' punitive damages award because the jury awarded Lewis neither compensatory nor nominal damages. Whether a plaintiff suing under the Federal Fair Housing Act may receive punitive damages absent compensatory or nominal damages is an issue of first impression in this Circuit. We review this legal question de novo.

The text of the Federal Fair Housing Act does not provide us with an easy answer. Section 3613(c) of the FHA provides that "(1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award the plaintiff actual and punitive damages." The FHA is silent as to whether punitive damages may be awarded absent actual damages. The text neither conditions a punitive damage award upon an award of actual

damages nor does it endorse the jury finding in this case.

The FHA's legislative history provides little guidance. The United States Department of Justice, as Amicus Curiae for Appellees, relies heavily on Congress's 1988 amendments to the FHA. In an effort to strengthen enforcement of the FHA, Congress removed the $1,000 limitation on punitive damage awards that had been part of the Act since it was passed in 1968. A House Committee stated that the limitation on damages "served as a major impediment to imposing an effective deterrent on violators and a disincentive for private persons to bring suits under existing law." H.R.Rep. No. 711, 100th Cong., 2d Sess. 15 (1988). The United States argues that imposing a requirement that compensatory damages are a necessary predicate to an award of punitive damages would frustrate Congress' purpose made clear in the 1988 amendments lifting the punitive damage limit. While the United States is correct to note that punitive damages are a very important component behind enforcement of the FHA, the legislative history neither supports nor discredits a punitive damages award absent actual damages.

Under these circumstances, we must apply the federal common law to fill this gap in the FHA which Congress has left unanswered. Courts create federal common law when it is necessary to effectuate the intent behind a federal statute. Erwin Chemerinsky, Federal Jurisdiction, § 6.3 at 353 (1994). When applying civil rights statutes, federal common law must be applied to effect uniformity, "otherwise the Civil Rights Acts would fail to effect the purposes and ends which Congress intended." Basista v. Weir, 340 F.2d 74, 86 (3d. Cir.1965). Thus, where a cause of action arises out of a federal statute, federal, not state,

law governs the scope of the remedy available to plaintiffs. Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dept. Stores, Inc., 15 F.3d 1275, 1288 (5th Cir.1994).

Based on these federal common law principles, we must assess both the FHA and other federal civil rights laws to determine whether a punitive damage award may stand absent a nominal or compensatory award. As the Fourth Circuit noted, "[t]here is no established federal common law rule that precludes the award of punitive damages in the absence of an award of compensatory damages." People Helpers Foundation, Inc. v. City of Richmond, Va., 12 F.3d 1321, 1326 (4th Cir.1993). We must determine whether there is a common law rule allowing such a result. The Fifth Circuit has not addressed this question as it applies to the FHA and decisions by other circuits provide a variety of different answers.

The two most recent cases come from the Third and Fourth Circuits. In Alexander v. Riga, 208 F.3d 419 (3d Cir.2000), a jury found that the defendant violated the FHA when he denied rental housing to the plaintiffs based on race. However, the jury did not award actual damages. The district court then declined to submit the issue of punitive damages to the jury. The Third Circuit reversed this decision stating: "it bears mentioning that beyond a doubt, punitive damages can be awarded in a civil rights case where a jury finds a constitutional violation, even when the jury has not awarded compensatory or nominal damages." Id. at 430 (citing Curtis v. Loether, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974); Basista, 340 F.2d at 87) (emphasis added). The Third Circuit additionally noted that a FHA violation is all that is needed to establish liability. Id. [FN2]

FN2. Although the Third Circuit suggests that a constitutional violation is a necessary predicate for a punitive damages award absent an actual damages award, the court reversed the district court without finding that a constitutional violation had taken place.

The Fourth Circuit dealt with a similar question when a jury in a FHA case awarded one dollar in punitive damages but no compensatory damages. The Fourth Circuit concluded that "in the absence of statutory language to the contrary" punitive damages are not recoverable unless predicated upon an award of actual damages. People Helpers Found., Inc., 12 F.3d at 1327. Nevertheless, we respectfully suggest that the Fourth Circuit's basis for this holding is flawed. First, the court did not rely on any civil rights cases in reaching its decision. Id. at 1326-27. A survey of cases interpreting federal civil rights laws is essential, in our view, because of the need to maintain a uniform federal common law. Second, the Fourth Circuit noted that a majority of the 50 states prohibit punitive damage awards when there is no compensatory award. Id. at 1327. Although state law may be useful in articulating a policy for our interpretation of federal common law, it is federal law that must be the centerpiece of our decision not state law.

Appellees contend that two other cases support upholding Lewis' punitive damages award. In Fountila v. Carter, 571 F.2d 487 (9th Cir.1978), a jury awarded one dollar in actual damages and $5,000 in punitive damages. The court noted in dicta that "it has in fact been noted that a finding of actual damages is not a condition to the award of punitive damages under the Civil Rights Act of 1968." Id. at 492 (citing Rogers v. Loether, 467 F.2d 1110, 1112 n. 4 (7th Cir.1972), aff'd. sub nom. Curtis v. Loether, 415 U.S. 189, 94

S.Ct. 1005, 39 L.Ed.2d 260 (1974)). This decision is not entirely on point because the jury did award a nominal award in addition to punitive damages. Moreover, the case relies on Rogers v. Loether. The Appellees argue that Rogers supports the proposition that the FHA does not require a finding of actual damages as a condition to the award of punitive damages. 467 F.2d at 1112 n. 4. However, the Seventh Circuit in Rogers never decided this question raising the issue only in dicta.

In conclusion, the FHA cases do not provide us with a uniform federal common law. The Third Circuit holds punitive damages may be appropriate when a constitutional violation exists. The Fourth Circuit closes the door on punitive damages absent an award of actual damages but uses questionable authority to reach that conclusion. The Seventh and Ninth Circuit cases suggest that a punitive award is permissible absent actual damages but did not confront the question directly as we must.

We must now examine decisions by this and other federal courts interpreting similar federal civil rights statutes. In a series of 42 U.S.C. § 1983 cases, the Fifth Circuit has articulated a standard for permitting punitive damages absent an award of actual damages. Ryland v. Shapiro, 708 F.2d 967, 976 (5th Cir.1983); Wilson v. Taylor, 658 F.2d 1021, 1033 (5th Cir.1981); McCulloch v. Glasgow, 620 F.2d 47, 51 (5th Cir.1980). In Ryland, 708 F.2d at 976, we said:

> The rule in our circuit is that in the absence of proof of actual injury, a plaintiff who has been deprived of his constitutional rights may only collect nominal damages. Mere proof of the violation of a right will not support an award of compensatory damages. However, claims of mental and emotional distress, if proven, can support an award of compensatory

damages. Moreover, the societal interest in deterring or punishing violators of constitutional rights supports an award of punitive damages even in the absence of actual injury. (Internal citations omitted and emphasis added).

Therefore, our circuit has adhered to the general rule that apunitive award may stand in the absence of actual damages where there has been a constitutional violation, a rule similar to the Third Circuit FHA rule in Alexander.

A review of other court decisions interpreting Section 1983 reveals a similar link between a finding of a constitutional violation and upholding a punitive award absent a showing of actual harm. The Seventh Circuit has long held that a jury may award punitive damages even absent a compensatory award if the plaintiff suffered a constitutional violation. Erwin v. Manitowoc, 872 F.2d 1292, 1299 (7th Cir.1989); McKinley v. Trattles, 732 F.2d 1320, 1326 (7th Cir.1984); Lenard v. Argento, 699 F.2d 874, 889 (7th Cir.1983); Endicott v. Huddleston, 644 F.2d 1208, 1217 (7th Cir.1980).

Beyond Section 1983, decisions interpreting other civil rights acts reach more varied results on the question whether a punitive award may be upheld absent actual damages. Speaking generally, the Third Circuit has said that federal law permits the recovery of punitive damages and as a matter of federal common law it is not necessary to prove nominal damages. Basista, 340 F.2d at 87.

However, since the Third Circuit's insightful decision in Basista, federal courts have become more divided on this punitive damages question. The Seventh Circuit determined that under 42 U.S.C. § 1981(a) a punitive damages award should not be conditioned on

the existence of a compensatory award. Although the Seventh Circuit relied heavily on its Section 1983 case law, it did not indicate that a constitutional violation was necessary for the punitive award to stand under 42 U.S.C. § 1981(a) or Title VII. Timm v. Progressive Steel Treating, Inc., 137 F.3d 1008, 1010 (7th Cir.1998). See also Buckner v. Franco, Inc., No. 97-6028, 1999 WL 232704, 1999 U.S.App. LEXIS 7369 *17 (6th Cir. Apr. 12, 1999) (noting in dicta support for Seventh Circuit's finding in Timm). However, in another 42 U.S.C. § 1981 case, the First Circuit held that a punitive damages award must be vacated absent either a compensatory damages award or a timely request for nominal damages. Kerr-Selgas v. American Airlines, Inc., 69 F.3d 1205, 1215 (1st Cir.1995). See also Frey v. Alldata Corp., 895 F.Supp. 221, 225 n. 1 (E.D.Wis.1995) (noting in dicta that only in cases involving a constitutional violation would federal courts allow a punitive damages award without compensatory damages); Paciorek v. Mich. Consolidated Gas Co., 179 F.R.D. 216, 221 (E.D.Mich.1998) (noting that under 42 U.S.C. § 1981(a)(b)(1) and American's with Disabilities Act nothing conditions the imposition of punitive damages upon an award of compensatory or nominal damages).

Although the goal of a federal common law of damages is to produce uniform results, so far the federal judiciary has not succeeded in this endeavor. There are many cases under the FHA and other civil rights statutes that support either upholding or vacating Lewis' punitive damages award. However, we find most instructive our own circuit's case law limiting punitive damages awards, absent an actual damages award, to cases were a violation of a constitutional right has occurred. LeBlanc did violate Lewis' rights under the FHA but he did not violate

Lewis' constitutional rights. For that reason, we vacate Lewis' punitive damage award. [FN3]

> FN3. Because we conclude that the punitive damages award cannot stand absent an award of actual damages, we do not decide whether a punitive damage award under the FHA must be based on egregious conduct or merely predicated on a violation of the statute. See generally Kolstad v. Am. Dental Ass'n., 527 U.S. 526, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999).

In the alternative, the Appellees argue that we should remand the case to the district court for a further determination of the damages award. First Appellees contend that because the jury found LeBlanc violated the FHA the district court should have award Lewis nominal damages for this invasion of his civil rights. Appellees contend that when rights are violated in a civil rights case a presumption of injury exists, thereby requiring at least nominal damages. Memphis Community School Dist. v. Stachura, 477 U.S. 299, 308, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986); Gore v. Turner, 563 F.2d 159, 164 (5th Cir.1977).

The cases Appellees cite are not applicable to the situation before us. In Memphis Community Sch. Dist., the Supreme Court noted that nominal damages may be an appropriate means of vindicating rights whose deprivation has not cause actual injury. 477 U.S. at 308 n. 11, 106 S.Ct. 2537. However, the Court made this statement in reference to a violation of a constitutional right under Section 1983. Likewise, in Gore, we recognized that nominal damages could be presumed from the denial of a constitutional right. 563 F.2d at 164. Neither case Appellees cite deal with a factual situation similar to this case where the jury decided not to award the plaintiff compensatory or

nominal damages. Moreover, we reiterate this case does not involve the violation of a constitutional right.

Next Appellees contend that the jury may have lumped the compensatory and nominal damages awards into the punitive sum because of its misunderstanding of the law. They also argue that the jury may have been confused about the damage definitions. We do not find this argument persuasive. The jury used a two- page verdict form that asked them only four questions addressing each type of damage award separately. The jury also asked the judge during deliberations for definitions of nominal and compensatory damages. Moreover, the fact that the jury awarded ACORN compensatory damages but not punitive damages refutes any argument that the jury may have been confused by the types of damage awards or lumped the various awards together.

B. ACORN's Standing

LeBlanc also appeals the jury's compensatory damages award to ACORN and the court's attorney's fees award to ACORN. ACORN also appeals its attorney's fees award. Before we reach the merits of these awards, we must determine sua sponte whether ACORN has standing to bring this suit against LeBlanc.

The Supreme Court, in Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), stated the minimum requirements that an organization must establish to have constitutional standing:

> First, the plaintiff must have suffered an injury in fact--an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second,

there must be a causal connection between the injury and the conduct complained of--the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed in a favorable decision. Lujan, 504 U.S. at 560-61, 112 S.Ct. 2130 (internal quotes, parentheses and citations omitted).

We must focus on the injury in fact requirement. Under the Federal Fair Housing Act, the Supreme Court has held that an organization has suffered injury in fact if the defendant's actions impaired the organization's ability to provide counseling and referral services. The Court said, "[s]uch concrete and demonstrable injury to the organization's activities--with the consequent drain on the organization's resources--constitutes far more than simply a setback to the organization's abstract social interests." Havens Realty Corp., v. Coleman, 455 U.S. 363, 379, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982). Although the Court in Havens dealt with standing at the pleadings stage, the Court noted that the organization will "have to demonstrate at trial that it has indeed suffered impairment in its role of facilitating open housing before it will be entitled to judicial relief." Id. at 379 n. 21, 102 S.Ct. 1114.

Based on these two cases, the Fifth Circuit has described what types of organizational activities do not meet the Supreme Court's injury in fact requirement. For example, "[t]he mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization." Association for Retarded Citizens of

Dallas v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees, 19 F.3d 241, 244 (5th Cir.1994) (Federal Fair Housing Act case); see also Association of Community Organizations for Reform Now v. Fowler, 178 F.3d 350, 358-59 (5th Cir.1999).

In contrast, we noted that an organization could have standing if it had proven a drain on its resources resulting from counteracting the effects of the defendant's actions. Id. at 360. Likewise, the Third Circuit concluded that a housing organization had standing where its staff "stopped everything else" and devoted all attention to the litigation in question and diverted resources to counter the defendant's conduct. Alexander, 208 F.3d at 427 n. 4. We reiterate that the Supreme Court in Havens noted that an organization must demonstrate at trial that it suffered some sort of impairment in facilitating open housing before receiving judicial relief.

We conclude that ACORN did not demonstrate at trial any impairment in facilitating open housing. At best ACORN proved the resources it expended defending Lewis (although ACORN never kept time sheets to record its work for Lewis); but it did not prove a drain on its resources. ACORN's executive director, Jeffrey Karlson, testified at length at the trial. However, Karlson neither mentioned any specific projects ACORN had to put on hold while working on Lewis' case nor did he describe in any detail how ACORN had to re-double efforts in the community to combat discrimination.

One excerpt in particular demonstrates the conjectural and hypothetical nature of Karlson's testimony. When asked to describe how LeBlanc's

discrimination frustrated ACORN's mission, Karlson said:

> Again, all I can do is base this on the mission of the organization being frustrated over two and a half years in trying to resolve this particular complaint to the extent that this one complaint started to take over an inordinate amount of our work time and staff time of our normal activities, really takes away from our activities in other areas, being able to do outreach and education, research and monitoring, intakes and investigations of complaints. It takes away from our normal activities--and this particular case has. My estimate is 96 and a half hours of our staff time, over two and a half years, and that's conservative. If I kept time sheets, probably much larger than that, but we did not.
>
> But in terms of frustration of mission, our mission after we resolved the complaint, we have to make up for all that lost ground and all that lost time. And I can't sit here and give you and exact amount for what that is, but we have to go back out and repair the damage that's been done, because the discrimination in this case is continuing and ongoing. That's why we're in court, trying to seek relief to get that to stop and to stop it from happening in the future. So, to the extent that we can do that through frustration of mission, we have to go back and redouble our efforts in the community to make up for that lost ground that was taken away from us during the course of this particular complaint and to help heal some of the damage in the community. I don't know if I can really explain it much more than that. (Tr. at 88-89).

None of ACORN's testimony at trial demonstrates a concrete and particularized injury as required by Lujan; instead, as the Supreme Court cautioned in

Lujan, ACORN's injury based on the testimony at trial is only conjectural, hypothetical and speculative. Therefore, we find that ACORN lacks standing to bring suit and reverse and vacate the jury's compensatory award to ACORN. In addition, because ACORN lacks standing, we conclude that ACORN is not longer a "prevailing party" pursuant to 42 U.S.C. § 3613(c) of the Federal Fair Housing Act. We also reverse and vacate the district court's award of $10,000 in attorney's fees to ACORN.

CONCLUSION

We reverse and vacate the district court's punitive damages award to Lewis, and the compensatory damages award and attorney's fees award to ACORN. In all other respects we affirm.

AFFIRMED IN PART, REVERSED AND VACATED IN PART.

KING, Chief Judge, concurring in part and dissenting in part:

Judge Duhe has written a careful and thorough opinion, and I concur in Part IIB of the opinion and its holding regarding ACORN's standing. While I agree fully with the description in Part IIA of the opinion of the legal landscape on the award of punitive damages, I cannot agree with its conclusion, and I would affirm Lewis' punitive damage award. As Judge Easterbrook said in declining to read a compensatory-punitive link into § 1981a or Title VII when no such link had been read into § 1983, "[e]xtra-statutory requirements for recovery should not be invented." Timm v. Progressive Steel Treating, Inc., 137 F.3d 1008, 1010 (7th Cir.1998). I can see no justification for inventing such a requirement for the FHA.

As the majority acknowledges, punitive damages are a very important part of the FHA's goal of eradicating discriminatory practices. "Punitive damages are awarded in the jury's discretion 'to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.' " Smith v. Wade, 461 U.S. 30, 54, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983) (quoting Restatement (Second) of Torts § 908(1) (1977)). The jury in this case clearly believed that the defendant had engaged in behavior that warranted a punitive award. Indeed, the behavior exhibited by this defendant has been unlawful for thirty years and is reminiscent of the blatant violations challenged shortly after the Act became effective. And yet, he emerges from this case with no financial disincentive to continue his practices. Nor are other landlords in the community hereby discouraged from engaging in similar practices.

I see no language in the Act dictating the majority's conclusion and I find it unfaithful to the FHA's purposes. I also see it as providing a basis for similar conclusions in other contexts, thereby threatening the fulfillment of other civil rights acts' goals. For these reasons, I respectfully dissent.

U.S. COURT OF APPEALS
FILED
MAY 15 2000
CHARLES R. FULBRUGE III
CLERK
U.S.D.C. Western District of LA
Robert H. Shemwell, Clerk
Date: 7.3.00
By: s/ BJ

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-31351

D.C. Docket No. 96-CV-1444

LOUISIANA ACORN FAIR HOUSING; Gene Lewis,
Plaintiffs-Appellees-Cross-Appellants,

v.

Danny LeBLANC,
Defendant-Appellant-Cross-Appellee.

Appeals from the United States District Court for the Western District of Louisiana, Lake Charles

Before KING, Chief Judge, and DUHE and DeMOSS, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed in part and reversed and vacated in part.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

KING, Chief Judge, concurring in part and dissenting in part:

ISSUED AS MANDATE: JUN 30 2000

Copy Sent:
Date: 7/3/00
By: s/ BJ

To:

A true copy
Test
Clerk, U.S. Court of Appeals, Fifth Circuit
By: s/ (illegible)

_____
Deputy
New Orleans, Louisiana JUN 30 2000

U.S. Court of Appeals
FILED
Jun 22 2000

CHARLES R. FULBRUGE III
CLERK
(notation o 6/22/00)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-31351

LOUISIANA ACORN FAIR HOUSING; Gene Lewis,
Plaintiffs-Appellees-Cross-
Appellants,
v.
Danny LeBLANC,
Defendant-Appellant-Cross-Appellee.

Appeals from the United States District Court for the
Western District of Louisiana

On Petition for Rehearing and Rehearing En Banc

(Opinion 5/15/00, 5 Cir. _____, F.3d _____)

Before KING, Chief Judge, and DUHE and DeMOSS,
Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

CLERK'S NOTE: SEE FRAP 41
FOR STAY OF THE MANDATE.

S/ John M. Duhe, Jr.

United States Circuit Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT LOUISIANA
LAKE CHARLES DIVISION

U.S. District Court
Western District of Louisiana
FILED
OCT 30 1998
Robert H. Shemwell, Clerk
By: s/H[?]B
Deputy

LOUISIANA ACORN FAIR HOUSING AND GENE LEWIS	: DOCKET NO.96-CV-1444
VS.	: JUDGE TRIMBLE
DANNY LEBLANC	:MAGISTRATE JUDGE WILSON

JUDGMENT

In accordance with the verdict of the jury and for the reasons stated in the corresponding memorandum ruling, it is hereby

ORDERED that there be judgement in favor of Louisiana Acorn Fair Housing and against Defendant, Danny Leblanc, in the full sum and amount of $1,076, together with legal interest from date of judgment until paid in full.

IT IS FURTHER ORDERED that there be judgement in favor of Gene Lewis and against Defendant, Danny Leblanc, in the full sum and amount of $10,000, together with legal interest from date of judgment until paid in full.

IT IS FURTHER ORDERED that Defendant, Danny Leblanc, pay to Louisiana Acorn Fair Housing the full sum and amount of $10,000, reflecting the attorneys' fees said Plaintiff is entitled to recover based upon the jury's verdict and applicable law in this matter.

IT IS FURTHER ORDERED that Defendant, Danny Leblanc, pay all costs of court.

THUS DONE AND SIGNED in chambers at Lake Charles, Louisiana, this 30th day of October, 1998.

JUDGEMENT ENTERED: 11/02/98
BY: s/sjd
COPY TO: Livingston
Garber
Hebert

s/ James Trimble
JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT LOUISIANA
LAKE CHARLES DIVISION

U.S. District Court
Western District of Louisiana
FILED
SEPT 15 1998
Robert H. Shemwell, Clerk
By: s/JB
_____
Deputy

LOUISIANA ACORN FAIR HOUSING AND GENE LEWIS	: DOCKET NO.96-CV-1444
VS.	: JUDGE TRIMBLE
DANNY LEBLANC	:MAGISTRATE JUDGE WILSON

VERDICT FORM

Question No. 1:

Do you find from a preponderance of the evidence that Danny Leblanc, or his agent(s0, made statements in a commercial context and in connection with the proposed rental of his property to Gene Lewis, indicating a preference not to rent apartments to black people? (Please check one)

Yes _X_ NO___

Question No. 2:

Do you find from a preponderance of the evidence that Danny Leblanc refused to rent an apartment to Gene Lewis and that race or color was an effective reason for such refusal? (Please check one)

Yes _X_ NO____

If you answered "No" to both questions 1 & 2, the foreperson should sign and date this form and notify the Court Security Officer that you have reached a verdict. If either question was answered "Yes," then proceed to answer the following questions.

Question No. 3:

Do you find, from a preponderance of the evidence that Plaintiffs, or either of them, as a result of such illegal discrimination, suffered any compensatory or nominal damages, and if so, in what amount?

(a) Gene Lewis: Compensatory: $None
Nominal: $None

(b) ACORN: Compensatory: $1,076
Nominal $None

Question No. 4:

A. Do you find from a preponderance of the evidence that Defendant's refusal to rent an apartment to Gene Lewis was motivated by ill will, malice, or desire to injure either Gene Lewis or ACORN, or by a reckless or callous disregard for the legal rights of either? (Please check one)

(1) Gene Lewis

Yes X NO____

(2) ACORN

Yes____ No X

B. If you answered "Yes" to either plaintiff, what amount, if any, of punitive damages do you award to that plaintiff?

(A) Gene Lewis:$10,000

(b)ACORN: $ X

WHEN THE VERDICT FORM HAS BEEN COMPLETED STOP, DATE AND SIGN THE FORM AND RETURN YOUR VERDICT.

(PLEASE DATE AND SIGN THIS FORM)

SO SAY WE ALL

September 15 , 1998 **s/Stanford R. Langley**
FOREPERSON